

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

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In the Matter of)
)
Preemption of State and Local Zoning and) FCC 97-296
Land Use Restrictions on the Siting,) MM Docket No. 97-182
Placement and Construction of Broadcast)
Station Transmission Facilities)
)

COMMENT OF DODGE COUNTY, WISCONSIN

This Comment is submitted to indicate Dodge County, Wisconsin's (hereinafter "County") opposition to the Federal Communication Commission's (hereinafter "Commission") adoption of a rule that will preempt state and local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities. The fundamental purpose of state and local planning and zoning authority is to promote the public health, safety, convenience and general welfare. Adoption of the Commission's proposed zoning preemption rule will unnecessarily deprive state and local governments of an important portion of their ability to regulate land use and development and will have substantial and direct negative effects on public health, safety, convenience and general welfare.

The Request for Comments section of the Commission's Notice of Proposed Rule Making identifies a number of specific issues on which the Commission seeks comment in order to allow the Commission to determine whether and how extensively it should exercise its authority to preempt state and local zoning and land use laws and ordinances. The County individually addresses these issues below.

General comments on the petitioners' proposals for the preemption of state and local laws, regulations and restrictions in the siting of broadcast transmission facilities.

In general terms, the petitioners' proposed preemption rule represents an attempt by a private interest to apply the power and resources of the Commission to eliminate the decision-making roles of state and local governments in certain zoning and land use issues. The County urges the Commission to reject the petitioners' proposed preemption rule, to allow the established state and local regulations to remain in place, and by so doing, to preserve the vital roles of state and local governments in zoning and land use regulation. The preemption sought by the petitioners is not necessary to achieve the purposes or objectives of federal law in the rapid implementation of digital television (hereinafter "DTV") service. Rather, the targeted elimination of state and local zoning and land use regulation is advocated by the petitioners because of its profitability to the private interests involved in the DTV program.

The rule proposed by the petitioners eliminates a significant portion of state and local control of zoning and land use regulation. Preemption of state laws and local zoning and land use ordinances is not necessary to fulfill the purposes and objectives of federal law in rapidly implementing the DTV program. Furthermore, the rule proposed by the petitioners represents an unjustifiable intrusion by the Commission into areas of primarily state and local concern that have been and that should continue to be regulated at the state and local levels. The procedural scheme set forth in the rule proposed by the petitioners is such that the practical effect of that scheme is to totally deprive state and local governments of any meaningful role in decisions concerning the placement, construction or modification of broadcast transmission facilities.

Comment on whether any rule adopted by the Commission should focus on actions state and local governments would be preempted from taking or on what state or local authority would be preempted by failure to act within a specific time period.

The County maintains the position that the preemption of state and local zoning authority in matters concerning the placement, construction or modification of broadcast transmission facilities wrongly deprives state and local governments of the power to fulfill their obligations to their citizens in promoting the public health, safety, convenience and general welfare. A preemption rule is simply not necessary to the success of the rapid implementation of the DTV program. Regardless of whether a preemption rule adopted by the Commission focuses on what state and local authority would be preempted by a failure on the part of state or local governments to act within an arbitrarily defined period of time, or whether such a rule focuses on whether certain types of actions that state and local governments would be preempted from taking, the direct negative impact on state and local governments is unchanged. In either situation, the preemption rule will be overbroad and will result in unnecessarily depriving state and local governments of their ability to adequately serve the interests of their citizens. Rather than entirely barring state and local governments from acting in certain areas, the Commission should allow state and local governments to continue to perform their vital functions in zoning and land use regulation and to act on issues presented to them. Furthermore, while it is reasonable to expect state and local governments to act within a reasonable period of time, that time period cannot be arbitrarily set by a federal preemption regulation which requires state and local governments to act within that time period or face preemption.

Comment concerning the nature and scope of broadcast tower siting issues including comment on the duration of local permitting processes tied to state laws and local ordinances.

The current Wisconsin Statutes and County ordinances that are applicable to broadcast transmission facilities do not present unnecessary or unreasonable delays or obstacles to the siting of broadcast transmission towers in the County. Of course, under the ordinances currently in place in the County, the duration of the permitting process for the siting of broadcast transmission facilities necessarily depends on the particular zoning district involved. For example, an individual seeking to locate a broadcast transmission tower, not more than 500 feet in height, in a prime agricultural zoning district, needs only to apply for a land use permit that is issued by the County Land Use Administrator. That land use permit is normally issued with

no waiting period. An individual seeking to locate a broadcast transmission tower, not more than 500 feet in height, in other zoning districts in the County must apply for a conditional use permit. Approximately 4-6 weeks following the application for the conditional use permit, a hearing on the application is held by the Planning and Surveyor Committee of the Dodge County Board of Supervisors, which then issues a decision approving or denying the application. The decision of the Planning and Surveyor Committee is reviewable by the Dodge County Board of Adjustment if the applicant seeks review of the Planning and Surveyor Committee's decision within 30 days of the date of that decision. Since applicants who do not receive approval from the Planning and Surveyor Committee normally immediately request review by the Board of Adjustment, the normal time between the Planning and Surveyor Committee decision and review by the Board of Adjustment is 4 weeks. Following a Board of Adjustment decision, an applicant has 30 days to seek certiorari review in the Dodge County Circuit Court.

In cases where an individual seeks to construct a broadcast transmission tower in excess of 500 feet in height, that individual must apply directly to the Board of Adjustment for a variance to the zoning ordinance. A hearing on that application will be held within 30 days of the date of the application and, as is the case with a conditional use permit, an applicant whose application is denied by the Board of Adjustment has 30 days following the Board of Adjustment's decision to seek certiorari review in the Circuit Court.

Comment on whether existing laws, ordinances and procedures are likely to impede adherence to the Commission's accelerated DTV build-out.

The existing laws, ordinances and procedures now in place in the County will not impede adherence to the accelerated DTV build-out schedule set forth in the Commission's Fifth Report and Order. As was detailed above, the applicable notice, hearing and appeal procedures that are in place under the current County ordinances provide for timely and thorough processing and review of applications. Preemption of these ordinances is not necessary for the accelerated DTV implementation schedule to succeed.

Comment on the appropriate scope of the preemption of state laws and local ordinances that is necessary for the success of the accelerated DTV implementation.

The preemption rule that is proposed by the petitioners vastly exceeds the scope of any action that can fairly and reasonably be justified by the Commission as necessary to the accelerated DTV implementation schedule. The petitioners proposed rule will have the effect of preempting all state and local regulation for all broadcast facilities and by so doing, will go far beyond facilitating the goals and objectives of Congress in implementing the accelerated DTV roll-out. The only action that it is appropriate for the Commission to take on the petition is for the Commission to determine that no preemption of state law and local regulation is necessary to the success of the DTV program. The Commission should reject the petitioners proposed rule and should preserve the essential role of state and local governments in protecting the interests of their citizens through zoning and land use regulation.

Comment on whether the Commission should preempt state and local restrictions regarding exposure to radio frequency ("RF") emissions from broadcast transmission facilities, interference effects on existing or potential broadcast facilities and local regulation intended for aesthetic purposes.

The Commission should not preempt state and local restrictions regarding exposure to RF emissions from broadcast transmission facilities, or regarding interference effects on existing or potential broadcast facilities. The Commission noted in the Notice of Proposed Rule Making that it has the authority to preempt where state or local regulation presents an obstacle to the accomplishment and execution of the full objectives of Congress or where the Commission feels that preemption is necessary to achieve the Commission's purposes. The simple fact that the Commission has the authority to preempt, however, does not mean that the Commission must preempt. The Wisconsin laws and County ordinances applicable here do not present obstacles to the DTV roll-out and should not be preempted. While federal standards can, and should, provide guidelines for exposure to RF emissions, interference effects, and other issues such as tower lighting and painting, these are primarily local matters concerning the health and welfare of the local population in an area. For similar reasons, the Commission should not preempt state and local regulations intended for aesthetic purposes.

Comment on the procedural framework proposed by petitioners.

The procedural framework contained in the petitioners' proposed rule is not reasonable and will have the effect of completely removing state and local government from the decision-making process concerning the siting, construction and relocation of broadcast transmission towers. The time limits set forth in the proposed rule are insufficient to provide for any meaningful participation by state or local governments to act on broadcast tower siting applications. In addition, the portions of the petitioners' proposed rule that entirely preempt state and local regulation of RF emissions, interference effects on existing or potential broadcast facilities and lighting, painting and marking requirements, will unnecessarily deprive state and local governments of their vital roles in zoning and land use regulation. The provision in the petitioners' proposed rule that places the burden on local governments to prove the reasonableness of every state and local regulation is so broad that the practical effect of that provision will be that all state and local regulation concerning tower siting will be preempted. This broad-based preemption of state and local regulation is unnecessary for the success of accelerated DTV build-out schedule and should not be adopted by the Commission.

The preservation of state and local regulation is essential for state and local governments to fulfill their obligations to promote the public health, safety, convenience and general welfare. In addition, while preemption of all state and local regulation may be profitable to the private interests involved in the construction of DTV facilities, such overly broad preemption does not serve the interests of the citizens in the areas where the installation of DTV facilities will occur.

Comment on the appropriate role of the Commission in resolving disputes between localities and licensees with respect to tower siting issues.

While a preemption rule is unnecessary and should not be adopted by the Commission, that is not to say that the Commission should not have some role in decisions concerning broadcast transmission facilities. The proper role of the Commission in resolving disputes between state and local governments and licensees is as the provider of a forum to which parties can turn for suggestions on resolving local disputes. The Commission might also serve as a mediator of disputes if both of the parties mutually consent to have the Commission act in such a role. However, disputes regarding DTV facility installation should not be resolved by mandatory arbitration conducted by the Commission. Rather, those disputes should be resolved by utilizing the existing processes and procedures that are in place under state and local regulations. Finally, certain disputes concerning DTV installation must necessarily find their ultimate conclusion in a judicial forum.

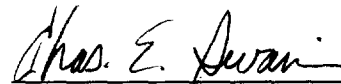
Conclusion.

The County opposes the Commission's adoption of the preemption rule proposed by the petitioners. Such a rule unnecessarily deprives state and local governments of their essential role in promoting public health, safety, convenience and general welfare. More importantly, the preemption rule proposed by the petitioners impermissibly seeks to apply the power of the Commission to place the interests of private entities involved in the DTV implementation program ahead of the interests of the citizens in the areas where DTV broadcast towers may be sited, constructed or relocated. The County urges the Commission to reject the petitioners' proposed preemption rule, to allow the established state and local regulations to remain in place, and by so doing, to preserve the vital roles of state and local governments in zoning and land use regulation.

Dated: October 21, 1997.

DODGE COUNTY, WISCONSIN

BY:



Charles E. Swain, Chairman
Dodge County Board of Supervisors